

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ARENA HOTEL CORP. D/B/A	:	
HOLIDAY INN- ARENA	:	DETERMINATION
	:	DTA NO. 818913
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 1997 through May 31, 2000.	:	

Petitioner, Arena Hotel Corp. d/b/a Holiday Inn- Arena, 2-8 Hawley Street, Binghamton, New York 13901, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1997 through May 31, 2000.

A small claims hearing was held before Frank W. Barrie, Presiding Officer, at the offices of the Division of Tax Appeals, 44 Hawley Street, Binghamton, New York, on October 16, 2002 at 1:00 P.M., with additional evidence to be submitted by October 30, 2002, which date began the three-month period for the issuance of this determination. Petitioner appeared by its officers, Ally Vishram and Dilip Hari. The Division of Taxation appeared by Barbara G. Billet, Esq. (Fredda Hamburg and Cory K. Buck).

ISSUE

Whether petitioner's request for a conciliation conference was filed late.

FINDINGS OF FACT

1. Petitioner has operated a full-service Holiday Inn hotel in downtown Binghamton for approximately 10 years. Over that period, it has taken pride in timely filing all of its tax returns and maintaining a professional relationship with the Division of Taxation (“Division”).

2. The Division issued a Notice of Determination dated September 10, 2001, with an Assessment ID of L-020061089, against petitioner asserting that, based on an audit, additional sales and use taxes were due for the period June 1, 1997 through May 31, 2000 in the amount of \$14,159.74, plus interest, before allowance of “Assessment Payments/ Credits” in the amount of \$6,861.51.

3. Petitioner requested a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services by mailing on December 12, 2001, which was a Wednesday, a Request for Conciliation Conference dated December 8, 2001,¹ which was a Saturday.

4. To establish proof of mailing of the Notice of Determination dated September 10, 2001 with reference to the Assessment ID of L-020061089, the Division submitted (i) an affidavit dated September 12, 2002 of Geraldine Mahon, the principal clerk of the Division’s Case and Resource Tracking System (“CARTS”) Control Unit, whose duties include the processing of notices of determination prior to shipment to the Division’s Mechanical Section for mailing, and (ii) an affidavit dated September 12, 2002 of Daniel LaFar, the chief processing clerk of the Division’s mail processing center.

¹ Petitioner asserted three substantive challenges to the assessment: (i) sales tax should not be assessed on capital items; (2) sales tax should not be assessed on charges for transportation of fuel until June 2000, and (3) credit should be given for overpayments of interstate long distance sales taxes.

5. The affidavit of Geraldine Mahon sets forth the Division's general practice and procedure for processing notices of determination. The certified mail record for statutory notices issued on September 10, 2001 attached to her affidavit indicates that the Notice of Determination dated September 10, 2001, with reference to the Assessment ID of L-020061089, was sent to petitioner at 2-8 Hawley Street, Binghamton, New York 13901-3114 by certified mail using certified control number 7104 1002 9739 0043 3140 on September 10, 2001, as indicated by an affixed United States postmark.

6. The affidavit of Daniel LaFar describes the operations and procedures followed by the mail processing center. After the statutory notices are placed in an "Outgoing Certified Mail" basket, a member of Mr. LaFar's staff weighs, seals and places postage on each envelope. The names and certified mail numbers are verified against the information contained on the certified mail record by checking the first and last pieces of certified mail listed on the certified mail record and a random review of 30 or fewer pieces of certified mail listed on the certified mail record by checking those envelopes against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to a branch of the United States Postal Service in the Albany, New York area. A postal employee affixes a postmark and also may place his or her initials or signature on the certified mail record indicating receipt by the post office. Here the postal employee affixed a postmark and initialed each page of the certified mail record consisting of 15 pages. The postal employee also circled the number 156 next to the heading, "Total Number of Pieces Received at Post Office," and initialed the last page of the certified mail record near this heading to indicate that the 156 pieces of mail listed were received at the post office on September 10, 2001.

7. By a Conciliation Order dated January 11, 2002, petitioner's request was denied for the following reason:

Since the notice was issued on September 10, 2001, but the request was not mailed until December 12, 2001, or in excess of 90 days, the request is late filed.

8. Petitioner's controller, Shafin Merali, completed the Request for Conference early Saturday morning, December 8, 2001. He intended to have Dilip Hari, petitioner's chief financial officer, review the request before he mailed it on Monday, December 10, 2001. During this period, Mr. Merali's wife was experiencing a very difficult pregnancy which ultimately resulted in the miscarriage of twin baby boys on December 17, 2001. During the weekend of December 8, 2001, Mr. Merali's wife was especially ill and he stayed home with her until December 12, 2001. When he came into work on that day, he realized he had not given the request to Mr. Hari for his review. He did so immediately and then mailed the request on the same day, Wednesday, December 12, 2001.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1138(a)(1), petitioner had to apply for a hearing with the Division of Tax Appeals within 90 days from the Division's mailing of the Notice of Determination dated September 10, 2001. Pursuant to Tax Law § 170(3-a)(a), petitioner also had the option to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services within 90 days from the Division's mailing of the Notice of Determination at issue. The evidence detailed in the Findings of Fact was adequate to establish that the Notice of Determination dated September 10, 2001 was in fact mailed on September 10, 2001 (*cf.*, ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). Consequently, 90 days from the Division's mailing of the Notice of Determination on September 10, 2001 is Sunday, December 9, 2001. Since the deadline ended on a Sunday, pursuant to General Construction Law § 25-a, petitioner

had until Monday, December 10, 2001 to mail its Request for Conference (*see, Matter of Steiger*, Tax Appeals Tribunal, July 11, 1991 [wherein the Tribunal noted that, pursuant to General Construction Law § 25-a, “when any period of time, computed from a certain day, within which an act is required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day”]). Nonetheless, as noted in Finding of Fact “8”, the request was not mailed until December 12, 2001, or two days late.

B. Petitioner is correct that Governor Pataki recognized the hardship inflicted on all New Yorkers as a result of the terrorist attacks on the World Trade Center and that he directed the Division to extend various tax related deadlines. The Governor’s notice N-01-14, Announcement Regarding the Terrorist Attacks of September 11, 2001, and notice N-01-16, Supplemental Announcement Regarding the Terrorist Attacks of September 11, 2001, specifically stated that all tax related deadlines from September 11, 2001 through December 10, 2001 were extended to December 10, 2001. However, this extension does not provide petitioner with relief for its late filing on December 12, 2001 of its Request for Conference.

C. It is further noted that the late filing of requests for a conciliation conference cannot be excused by a personal tragedy, ill health or extenuating circumstances (*see, Matter of Perillo*, Tax Appeals Tribunal, August 2, 1990; *Matter of Rathgaber*, Tax Appeals Tribunal, April 5, 1990).

D. However, petitioner is not without a remedy. Prior to January 1, 1997, sales tax asserted due in a notice of determination was finally and irrevocably fixed as a consequence of a taxpayer’s failure to timely contest such notice. However, the Laws of 1996 (ch 267) amended Tax Law § 1138(a)(1) by deleting the language in the former statutory provision which finally and irrevocably fixed sales tax determined due. This amendment was effective July 2, 1996, but

made applicable to taxable years commencing on and after January 1, 1997 as specified in section 3 of Laws of 1996 (ch 267). As a result, petitioner for the period at issue, which is subsequent to January 1, 1997, may pay the assessment at issue and apply for a refund. If its refund is disallowed or six months have expired since the claim was filed, petitioner may then file a petition or a request for a conciliation conference and have the merits of its claim reviewed.

E. As noted in Finding of Fact “1”, given petitioner’s cooperation with the Division in the past, it would seem reasonable to presume, given petitioner’s ability to ultimately have a review on the merits, that the Division in the first instance would address petitioner’s contentions concerning substantive errors in the audit which resulted in the issuance of the Notice of Determination dated September 10, 2001. Further, it behooves the Division to take into consideration the fact, as emphasized by petitioner at the hearing in this matter, that after the attacks on September 11, 2001, the hotel industry in general has faced a difficult period of a lower than normal occupancy rate with the resulting loss of revenues. According to petitioner, its own occupancy rate dropped approximately 40% post September 11th making it much more difficult to operate its hotel in downtown Binghamton. Consequently, although there is no authority to direct the Division to consider the merits of petitioner’s claims *before* petitioner pays the assessment and requests a refund, it is encouraged to consider the circumstances described above and act accordingly.

F. The petition of Arena Hotel Corp. d/b/a Holiday Inn-Arena is denied, and the Notice of Determination dated September 10, 2001 is sustained.

DATED: Troy, New York
January 2, 2003

/s/ Frank W. Barrie
PRESIDING OFFICER